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SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 272.

SQUEEZ-A-PURSE CORPORATION,
Petitioner,

vs.

BENJAMIN STILLER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF RESPONDENT.

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Although the simple facts of the case at bar are that the Petitioner, through its executive officer, Nathan Silverman, saw the Defendant's patented purse at a convention and merely ordered "* * * better than a Chinese copy * * *" of it manufactured, the Petitioner, nonetheless, continues to advance to this Court that this case involves a matter of grave importance that should occupy the attention of this Court.

We submit that, in fact, the opposite is true and that the proceedings below have adequately and completely disposed of an adjudicated infringer.

In the Petition, three questions were presented. The Respondent's Brief in Opposition pointed out that though the questions were framed in such a manner as to be "eye catching" they were, in fact, based upon a hypothetical fact situation different from the case at bar.

For example, the Petitioner's first question was directed to the subject of "invention" and in presenting the question the Petitioner assumed that all of the elements were, in fact, old and then proceeded to postulate that a Court finding "invention" in a combination of such old elements was in error unless 35 U. S. C. 103 had changed the standard of invention.

Likewise, and for the purpose of presenting the *A & P* doctrine for consideration under the Second Question, the Petitioner again assumes that all elements are in fact, or by admission, old, and that the Sixth Circuit Court of Appeals thus deviates from the rule of law of *Atlantic and Pacific* in finding patentability in such a combination of elements.

These are "straw grasping" maneuvers because the fact is that the Trial Court found novelty in at least two of the seven elements present in the Claim presented for consideration. This finding of novelty was affirmed by the Court of Appeals.

With reference to the question of novelty of elements A through E, Petitioner relies upon the Judgment of August 17, 1960 (Appendix C) in refutation of Respondent's assertions at pages 6 and 12 of Respondent's Brief. *Such Judgment is not before this Court and is irrelevant to the petition for certiorari.* For the purpose of denying this Petition, the Lower Court's finding as to elements A through E is irrelevant, because the Lower Court found elements F and G to be novel and found the overall combination of all the elements to be "unique and unitary." Such finding is in conformance with the requirements of the *A & P* case and is exactly opposite to the hypothetical question posed for review. Petitioner, by focusing on elements A through E, is attempting to distract the Court's attention from the issue raised by the questions by cre-

ating a diversionary conflict. Note that at no time has Petitioner denied that the Trial Court *found* elements F and G to be new and *found* the combination of all elements A through G to be unique and unitary.

In answer to petitioner's implication of an "indefensible assertion" we need only point out that respondent's Brief was completed on August 17, 1960, and delivered to the printer on August 18, 1960. In any event, the basis for the petition is not the judgment of August 17, 1960, but instead, is the Order of May 27, 1959, which is reproduced herein as Appendix E.

Petitioner also quotes, out of context, the testimony of Respondent's expert in order to controvert the *finding* of fact as to elements F and G—a finding of fact which has *not* been assigned as error in the questions presented. With regard to such testimony it need only be noted that the Trial Court, considering *the whole of Dr. Hoover's testimony, together with the whole of the testimony of the Petitioner's expert, Mr. Gross*, reached the finding that such elements were new.

With regard to the supposed "admissions" of counsel, allegedly contained in the chart (Appendix D), no such "admissions" have been or could have been made. Petitioner's utilization of this chart was anticipated by Respondent and has been answered at pages 5 and 6 of Respondent's Brief. It is believed to be unnecessary to repeat such arguments herein. Suffice it to say that in order to bend the "fact" situation to fit the Questions Presented for Review, Petitioner is attempting to substitute its out-of-context reading of the chart for the ultimate *findings* of fact.

Petitioner argues as though the Questions Presented for Review challenge the Court's findings as to (1) the novelty of elements F and G and (2) the uniqueness of

combination of the elements. No such challenge was made. The issues are not before the Court.

It is apparent therefore, that Petitioner seeks reargument of a factual question under the guise of presenting a question of great moment to the Bench and Bar.

Respondents further reply by noting that while the original Petition advanced that certiorari should be granted as to the First Question on the basis of conflicting Circuit Court opinions, that this position is now untenable, apparently in view of the Respondent's citation of authority that there is complete harmony among the various circuits on this question.

In that portion of its Reply Brief directed to discussion of the "Second Question," the Petitioner, in the single paragraph of pages 4 and 5 thereof, makes the assertion that Respondents have sought to avoid the question propounded by the Petition. It is charged that this avoidance is accomplished by Respondents claiming the existence of new elements F and G.

The folly of this argument is apparent, as the Respondents have merely reiterated the Court finding in analyzing the actual question presented for review. In fact, the Second Question involves merely the determination of whether *old and new* elements can be arranged in a *new and unobvious manner* to form *an unique and unitary combination*. It is Petitioner who avoids this question by asserting that all elements are old when, in fact, the Court's opinion was based upon the conclusion that there were *old and new* elements involved in the combination.

With regard to that portion of the Reply Brief of Petitioner which is directed to the Third Question, we submit that there is again present a situation where the Petitioner presents a hypothetical fact situation different from the case at bar.

On this point the Trial Court did not ignore the prior art because of the non-commercialization thereof. Rather, the Trial Court did, as the authorities unanimously permit, consider the non-commercialization of the prior art in deciding the question of Invention. *Separately and distinctly it additionally rejected the art as being non-anticipatory.* Thus, the Patent Office, on two occasions, the District Court, and the Sixth Circuit Court of Appeals have found that the prior art of record is lacking for anticipation purposes, regardless of the commercialization or non-commercialization thereof.

CONCLUSION.

It is significant that Petitioner in the Reply Brief has made no answer to Respondent's contention that there is no "case or controversy" embodied in the petition.

The Reply Brief presents no adequate rebuttal to the argument advanced by the Respondent's Brief in Opposition to the Petition.

The Petition should be denied.

Respectfully submitted,

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Attorney for Respondent.

J. WILLIAM FREEMAN,

Of Counsel.

APPENDIX E.

ORDER DISMISSING COMPLAINT.

(Entered May 27, 1959.)

It is ordered that the complaint be dismissed; that the defendants be awarded judgment of validity and infringement on their counterclaim; and that an injunction and accounting be had as prayed, all at plaintiff's costs.